The Renewal of Section 5 of the Voting Rights Act: Some Facts and Some Thoughts

Remarks prepared for presentation to the United States House of Representatives Judiciary Committee, Subcommittee on the Constitution

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Chairman Chabot, Representative Nadler, and honorable Representatives: my thanks for the invitation to appear before this panel to discuss the renewal of the Voting Rights Act. I am very pleased to appear before you today.

My name is Ronald Keith Gaddie. I am a professor of political science at the University of Oklahoma, where I teach courses and write on American electoral politics. Since 2001 I have worked as a litigation consultant and expert witness in voting rights and redistricting cases in several states, including Texas, Oklahoma, Wisconsin, New Mexico, Virginia, South Dakota, and Georgia, for jurisdictions, plaintiffs, Democrats and Republicans. I have authored or coauthored eight books on aspects of American politics. Currently, with my colleague Charles S. Bullock III of the University of Georgia, I am completing an analysis of the progress on minority voter participation and elections in the jurisdictions covered by Section 5 of the Voting Rights Act. This study is supported by the American Enterprise Institute, through the Blum-Thernstrom Project on Fair Representation.

The Voting Rights Act has framed American electoral politics for forty years. The Act stands as the enforcement mechanism for one of two "superior" redistricting principles of voting rights, that of racial fairness (the other principle being the one-person, one-vote guarantee). The most proactive tools of the Voting Rights Act are up for renewal. This periodic review and renewal of legislation gives us the chance to ask, "what have we done and how far have we come?"

This statement will highlight trends in minority participation in the seven states originally covered by the Act. I will then frame some topics for discussion as we move toward the renewal of the Act, with some attention paid to the history and prospects for minority voter participation in Georgia, Louisiana, and South Carolina.

The Problem

The initial concern of the Voting Rights Act was access to the political process. Political scientist V. O. Key, writing over a half-century ago in his classic *Southern Politics: In State and Nation*, observed that "the South may not be the nation's number one political problem . . . but politics is the South's number one problem." (1949: 3) Participation was

necessary to a functioning democracy, for Key, who observed that the problem of participation in South, like every other problem, could be traced to the status of blacks.

What was the status of Southern blacks? Well, depending on where you went in the South variations were in evidence, but southern blacks were generally disfranchised, generally discriminated against, and generally held at a distance from white society –specifically the prosperous part of white society -- by public policy. Key observed that "whites govern and win for themselves the benefits of discriminatory public policy" and further noted that "discrimination in favor of whites tends to increase roughly as Negroes are more completely excluded from the suffrage" (1949: 528). Exclusion from the vote did not cause discriminatory treatment, but it most certainly reinforced the status of Southern blacks. Key observed in a clinical fashion what Martin Luther King, Jr. argued passionately in 1965, "give us the vote and we will change the South." It was only by the exercise of political power through ballots that politicians would change policy in the long run.

We have the opportunity for a frank, informed conversation about the shape of the Voting Rights Act for the future. And I thank the chairman and committee for holding these hearings in order to advance this conversation. What should take place in this conversation?

Context: The "Then and Now" of the Adoption of Section 5

In 1964, there was one black state legislator in the seven states originally covered by Section 5. The South lumbered under an archaic and outdated political and social culture that clung to the past at the possible cost of the future. There was no viable competition to the Democratic Party, which was locally a contrary adjunct to the national party, opposed to the Democrats in the rest of the nation on most every dimension of social policy politics.

The contemporary South is vibrant, the most populous and fastest-growing region of the nation. Southern children are more likely to attend integrated schools than in the rest of the nation, and an African American is more likely to have black representation in the South than anywhere else in the nation. Education and income differences across the races are matters of degree rather than orders of magnitude. Southern blacks are registered and voting at rates comparable to black voters in the rest of the nation. There is a two-party system in the South which fosters black political empowerment and office-holding. However, that empowerment comes as the party of choice for most African-Americans, the Democratic Party, has been relegated to minority status in the legislature of three of the original Section 5 states and also in the covered states of Texas and Florida.

Race still divides the South, but southern blacks are not helpless in the pursuit of political, social, and economic goals when compared to five decade ago. The context of

race relations and the status of minorities in the South are dramatically changed from four decades ago.

Minority participation in the Political Process and How Section 5 Advanced That Cause

In my previous testimony to the US Commission on Civil Rights, I used as a starting point Table 1, which contains information from Earl and Merle Black's *Politics and Society in the South.* This table shows the growth of black voters in the South. By 1984, South Carolina and Mississippi ranked at the top of proportion black electorate. Mississippi and Alabama registered the largest proportional gain of size in the black electorate, though Mississippi simultaneously ranked "high" and "low" because the baseline for minority participation was so very low, large proportional gains were inevitable. Georgia and Louisiana conversely rank near the bottom of proportional gain in part because of having the highest rates of black registration of any state originally covered by Section 5. By 1984, the black percentage among registrants tracks closely with the black percentage in the voting age population, evidence of the success of the Voting Rights Act in eliminating obstacles to participation. The states with the largest *potential* black electorates (Mississippi and South Carolina) had the most-heavily African-American voter registration rolls.

The Black brothers' analysis informs us as to the proportionately largest black electorates in the South. Tables 2 and 3 present Census Bureau estimates of black voter registration and participation since 1980 for the seven states originally covered by Section 5. Black registration lags white registration for most of the time period in the seven covered states analyzed (as it does in nonsouthern states throughout the time series). But, for the last four elections for which there are comparative data, black registration in six of the seven states (all but Virginia) exceeds black registration rates in the nonsouthern states. In three of the states (Georgia, South Carolina, Mississippi), black registration rates exceeded white registration rates within those states for at least two of the last four elections.

Black turnout rates are less consistently above the national average. As indicated in Table 3, three of the original Section 5 states – Alabama, Mississippi, and Louisiana – have black turnout consistently above the national average for black turnout. Every covered state except Virginia reports higher black than white turnout rates at least once since 1990, and Georgia reports higher black than white turnout in three of the last four general elections. Differences in racial registration and participation have become differences of degree rather than of magnitude.

These votes are generally translated into seats. Figure 1 presents time-lines, since 1964, of the percentage of state legislative seats held by black incumbents in the state legislatures of the seven original Section 5 states. Of these states, Alabama has achieved proportionality in the legislature relative to citizen voting age population, while Georgia, Mississippi, and North Carolina are approaching proportionality (data for this graphic appear in Table 4).

At the congressional level, the 1990s saw significant advancement of descriptive African-American representation. The number of southern, African-American members of Congress tripled. In the states covered by Section 5, the number increased from three in 1991 to a current eleven (one from Virginia, two from North Carolina, one from South Carolina, four from Georgia, one from Alabama, one from Mississippi, and one from Louisiana) -- 18% of all congressmen from these states are African-American, compared to 25% African-American citizen voting age population. If we also add the black congressmen elected from the other two Section 5 southern states – Texas and Florida – we total seventeen black MCs, or 15% of all MCs from nine states that are collectively 18.9% black by citizen voting age population.[1] Black representation in the Section 5 states is not proportional to the black citizen voting age population. But, black descriptive representation is as high as it has ever been in southern legislatures in modern times, and is approaching proportionality to the extent that the geographic placement of black voters and the tendencies of electorates in general elect black candidates who seek legislative office (see Table 5). As is widely recognized, in single-member, plurality political systems like in the US (in contrast with the proportional systems used in most of Europe), the majority group gets a disproportionate share of the legislative seats and the minority groups gets less than its proportional share.

What is Retrogression?

A change in election law that results in an adverse effect on opportunities for a racial (or protected language minority) group to participate in the electoral process constitutes retrogression. More precisely, legal retrogression occurs when a jurisdiction covered by Section 5, reduces the opportunity for minorities to participate effectively. The law firm of Bickerstaff, Heath, Smiley, Pollan, Kever, & McDaniel LL of Dallas describes a retrogressive change as follows:

> The preclearance inquiry examines whether a proposed voting change is retrogressive compared to the legal benchmark . . . For example, a change from a single-member district system in which a minority group consistently has been able to elect candidates of its choice, to an at-large system in which the minority group has such small numbers that it will always be outvoted for all elected positions by the larger non-minority population, would be retrogressive and unlikely to receive preclearance. This is an extreme example, of course; there are

[1] The nine Southern states that are Section 5-covered contain one-fourth of the citizen voting age population in the United States. Those states are 18.9% African-American citizen VAP, and contain 43.9% of all citizen VAP blacks in the United States. The original seven Section 5 states are 24.9% citizen VAP by population, and contain 30.8% of all citizen VAP black in the United States.

other instances involving less obviously adverse changes that might be considered retrogressive.[2]

The benchmark is the last legally-enforceable plan; preclearance alone does not guarantee status as the benchmark, as is evident from cases such as *Miller*.[3] How jurisdictions address retrogression became a source of political and legal confusion in the first decade of the 21st century. Until July 2003, retrogression occurred if the ability of a minority group to elect its candidates of choice was reduced. Retrogression, when applied to redistricting, is measured for the entire proposed plan relative to opportunities under the new plan.

Assume, for example, an existing thirty-district state legislative map had three majority-minority districts, all of which elected candidates of choice of the minority group. The new map eliminates a minority districts and does not create an offsetting one elsewhere. The new map retrogresses against existing minority opportunities. Were a new district plan to eliminate a minority district while creating a new one, the number of minority

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[2]See *Beer v. United States*; quote from "Frequently Asked Questions on DOJ and Preclearance." http://www.votinglaw.com/dojfaq.html#13, accessed September 30 2005. Bickerstaff et al assert that the last precleared plan is the benchmark, which is incorrect. In *Young v. Fordice* (520 U.S. 273 (1997).), the State of Mississippi had administratively implemented a new "provisional" registration system in order to comply with the Motor Voter Act (the provisional plan) this plan was represented by state election officials as the plan that would be passed by the legislature and this plan was subsequently precleared by the Department of Justice even though it was not in conformance with Mississippi statutory law. Contrary to the representations of elections officials, the legislature refused to pass the provisional plan and created a dual registration system for federal and state elections. The Department of Justice asserted that since the provisional plan had already been implemented and precleared, it became the benchmark for measuring the system created by the legislature. The Supreme Court, in a unanimous opinion, rejected this argument and held that the provisional plan was not the benchmark, and that the old system, prior to the Motor Voter Act was the benchmark for the measurement of retrogression. In *Abrams v. Johnson* (521 U.S. 74 (1997)), after the redistricting plan for the Georgia congressional districts had been found unconstitutional by the District Court, various parties asserted a variety of benchmarks under §5. The Department of Justice proposed that the redistricting plan "shorn of its constitutional defects" was the appropriate benchmark. Other appellants asserted that the 1992 redistricting plan passed by the Georgia Legislature, signed by the Governor and submitted but objected to by the Department of Justice constituted the benchmark under §5. The Court rejected both proposals and stated unequivocally that the "appropriate benchmark is, in fact, what the district court concluded it would be, the 1982 plan." As the Court noted "there are sound reasons for requiring benchmarks to be plans that have been in effect; otherwise a myriad of benchmarks would be proposed in every case, with attendant confusion."

[3] See also 42 U.S.C. § 1973c; *Beer v. United States*, 425 U.S. 130 (1976); *Miller v. Johnson*, 515 U.S. 900 (1995).

opportunities for access would be unchanged, and retrogression would not have occurred.[4] The submitting jurisdiction rather than the Department of Justice (DOJ) bears the burden of proof for demonstrating non-retrogression. Another facet of the retrogression standard generally prohibited the reduction in the minority concentration in an existing majority-minority district.

The US Department of Justice may not apply other standards in addition to retrogression when determining whether to preclear new districting plans. The Supreme Court has ruled out standards that go beyond the charge to the agency under Section 5 which only sets the floor of ensuring no loss of political ground by minorities.[5]

Georgia v. Ashcroft altered the retrogression standard.[6] Georgia lowered the black percentage of the voting age population in a number of state legislative districts and redistributed this population to craft more districts that were competitive for Democratic candidates. In majority-white districts with increased numbers of blacks it would be possible for a biracial coalition to elect Democrats. In reviewing the Georgia plan, the Supreme Court held that evidence of non-retrogression can include coalition districts – identified by plaintiffs as districts between 30% and 50% black by population. This offered to jurisdictions two avenues for satisfying the non-retrogression: fewer, safer minority districts, more less-safe minority districts and coalition districts, or some combination. The second option offered in *Ashcroft* permits reducing the concentrations of minorities in majority-minority districts – which may result in less certainty of minority candidates being elected -- in exchange for a greater number of districts in which minorities may be able to coalesce with white voters to elect candidates preferred by the minority voters. In other words, with less certainty comes greater opportunity to spread influence, assuming one were willing to pull, trade, and haul. Such districts were deemed more permissible if the elected representatives belonging to the minority community supported the creating of access and influence districts in the political process. As stated by Justice O'Conner, writing for the majority:

> the retrogression inquiry asks how "voters will probably act in the circumstances in which they live." Post, at 19. The representatives of districts created to ensure continued minority participation in the political process have some knowledge about how "voters will probably act" and whether the proposed change will decrease minority voters' effective exercise of the electoral franchise.[7]

So there are multiple avenues to satisfy Section 5. Does this broadening of solutions also broaden the scope of districts protected from retrogression? To understand the means by which one satisfies nonretrogression, we need to consider the nature of Section 5. Has it become so blurred by recent litigation that the provision is emerging as a vehicle for the

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[4] Retrogression is assessed using the old district plan as a baseline, but applying the most recent census data to the previous (old) boundaries.

[5] *Reno v. Bossier Parish School Board,* 520 U.S. 471 (1997).

[6] *Georgia v. Ashcroft,* 539 U.S. ____ (2003).

[7] 539 U. S. ____ (2003), at page 20.

pursuit of partisan advantage rather than ensuring minority group access to the political process?

Republican administrations, specifically the first Bush Administration, used the Voting Rights Act as a lever to encourage the creation of majority-minority districts, and to limit the opportunities to create cross-racial coalitions in support of Democrats. White Democrats in turn preferred districts with sizeable (but not majority) minority populations because of the biracial coalitions that could command more seats. In the 1980 and 1990 rounds of redistricting, African-American Democrats preferred districts with black majorities sufficient to elect an African American.

The aggressive use of Section 2 of the Voting Rights Act to create majority-minority districts in the early 1990s resulted in an electoral map that shifted one-third of all southern congressional districts to the GOP in a three-election period. That these newly acquired Republican districts were largely bereft of minority voters and next-door to majority-minority districts is more than coincidence. These districts were urged by the Justice Department as part of a "maximization strategy", using preclearance as a policy lever.[8] Congressional plans which maximized minority seats and had been approved (in some cases demanded) by the Justice Department were overturned by courts in Georgia, Louisiana, North Carolina, Virginia, and Texas. A quote from John Dunne, assistant attorney general for civil rights in the first Bush Administration Justice Department, taken at deposition in *Miller v. Johnson*, is instructive in acknowledging the political dimension to the use of preclearance:

> You know, I can't tell you that I was sort of like a monk hidden away in a monastery with only the most pure of intentions. I am a Republican. I was part of a Republican administration. And to tell you that at no moment during the course of my, the discharge of my responsibilities, was I totally immune or insensitive to political considerations, I don't think would justify anybody's belief. But I can't really tell you much more than that.

The consequence -- concentrating the most loyal Democratic voters into the fewest districts possible -- paid political benefits. The number of congressional districts with between 20 and 40% African-American population southwide – districts especially likely to elect white Democrats -- fell from 50 seats to 22, and within two elections the number of Republicans from southern states nearly doubled.

[8] An example of the judicial eye recognizing this strategy comes from the Georgia litigation, wherein the court concluded "[i]t is clear that a black maximization policy had become an integral part of the Section 5 preclearance process . . . when the Georgia redistricting plans were under review. The net effect of the DOJ's preclearance objection[s] . . . was to require the State of Georgia to increase the number of majority black districts in its redistricting plans, which were already ameliorative plans, beyond any reasonable concept of non-retrogression." 929 F. Supp., at 1540–1541

Another effect was the shape of the new congressional constituencies. Described as bizarre, tortured, irregular, and non-compact, many of the new congressional districts created by states to comply with Justice Department efforts – combined with the pursuit of other political goals such as incumbency protection -- stretched the credibility of the terms "compact" and "contiguous." This "spiral down" effect on compactness resulted from the meeting of the policies of the Department of Justice and the determination of the legislatures in the jurisdictions to protect incumbents.

> DOJ refused to enforce any compactness rule asserting that compactness was a state policy and therefore the level of compactness in districts was an issue outside of the scope of the preclearance process. As stated in its preclearance letter for the Texas congressional redistricting scheme [w]hile we are preclearing this plan under Section 5 the extraordinarily convoluted nature of some of the districts compels me to disclaim any implication that our preclearance establishes that the proposed plan is otherwise lawful or constitutional…Our preclearance of the submitted redistricting plan in no way addresses the state's approach to its redistricting obligations other than with regard to section 5.[9]

DOJ's policy that "reductions in the minority percentages in one district might be effectively counterbalanced by increases in others" essentially meant that jurisdictions did not have to be geographically specific when attempting to remedy the dilution of a minority community's voting strength. In jurisdictions such as North Carolina, Georgia, and Texas, mapmakers responded by drawing far less compact minority districts than might have been possible, in order to ameliorate the political effects of drawing the compact majority minority district.[10] This "new" standard of compactness was then used to prompt the crafting of additional majority minority districts, which could not be drawn under the original standard of compactness advocated by the jurisdiction. The result was a downward spiral of demands for crafting minority districts, lowered compactness, and sparring to protect incumbents, which in turn led to the least compact plans, but with more majority minority districts than ever before.

So, we see two political dimensions of the implementation of voting rights creating further legal and political conflict: the effort by southern legislatures to protect incumbents and facilitate (possibly) politically-motivated Justice Department demands to create new minority opportunities, results in the torturous shape of the legislative districts challenged in the Shaw/Reno-styled cases of the 1990s.

Partisan goals and the role of minority voters continue to define redistricting. Most recently, Georgia and Texas offer opposite perspectives on the effort to seize electoral advantage while playing politics that affect or relate to the Voting Rights Act.

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[9] Letter of John Dunne to Texas Attorney General Morales, Nov. 18, 1991.

[10] Revision of Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, 52 Fed. Reg. 486, 488 (1987) (commentary to the rule) (codified at 28 C.F.R. §51 et seq.)

In 2001 Georgia Democrats moved to retain control of the state legislature while also expanding their foothold in the state's congressional delegation. This was accomplished through the efficient allocation of black, Democratic voters in a fashion partially opposed by the Justice Department, and which required litigation to establish. This efficient allocation reduced minority majorities particularly in some state Senate districts and was considered retrogressive by the Justice Department. Because the elected representatives of the community of interest approved of the strategy, and because minority choices could prevail in most of the coalition districts, the Supreme Court held that the use of coalition districts as an alternative to less heavily–minority districts was permissible (though not required) to satisfy Section 5.[11]

This change in the definition of retrogression occurred during the recent Texas redistricting. In Texas, plaintiffs challenged the mid-decade congressional redistricting on several dimensions. One claim was that districts lacking a majority of a minority, but electing candidates preferred by minority voters, were protected from change under Section 5. One Plaintiff's expert testified that districts as low as 5% minority population might be protected from change under the Voting Rights Act, unless agreed to by the minority community's leadership. This reasoning was rejected by both the Justice Department, which precleared the new Texas map and the Federal district court in Austin, which explicitly rejected the argument that there is an obligation to create coalition districts under federal law.

The use of Section 2 as incorporated into Section 5 reviews was a powerful lever for concentrating instead of spreading minority populations in creating minority-majority districts and accompanying, largely white districts that presented electoral opportunities for Republicans. From the perspective of the Republican Party, it has been successfully used, given the dramatic realignment of southern congressional delegation in the early 1990s. The redistricting compelled by the Justice Department under Section 5 is not solely responsible, but when combined with the departure of incumbents and wedge issues, the redistricting facilitated the doubling of Southern Republican congressional strength. The interpretation under *Ashcroft* facilitates the reintroduction of coalition constituencies, with the approval of the representatives of the minority community, or, in other words, allows in theory for the crafting of constituencies of the sort that once contributed to the Democratic southern congressional majority until 1994.

This latest change raises a question that I first articulated in 2003 at the Texas State Senate redistricting hearings, of how one establishes a baseline for evaluating retrogression. My perspective is that of a social scientist charged with conducting analyses to inform those who make and interpret the law, rather than from the perspective of a legal thinker, and should be taken as such. If retrogression is evaluated in the context of an entire map, and constituencies in which a white legislator relies on biracial support are among the districts protected from retrogression, then how are those districts to be treated in subsequent efforts to baseline minority access and evaluate retrogression?

[11] The Justice Department did approve of 53 of 56 proposed Georgia Senate districts, indicating the relatively narrow scope of objection to the total map.

My concern with efforts to use retrogression to maintain coalition districts is that it sets up a circumstance where part of the legislative map becomes immune to political change under redistricting. If districts where a cohesive minority electorate is not in a position to control the election of consequence are counted among protected districts, then party bias is introduced. Any district, anywhere, in which minorities, no matter how small a percentage of the electorate, vote for the Democratic candidate, conceivably becomes immune from change. In this instance, Democratic districts are locked in as part of the district format. One party gets a guarantee of protection for its seats, but the other does not.

A second question arises. If minority candidates and candidates of choice can be elected from districts with minority percentages of the voting age population of under a majority, say as low as 44.3%, or even as low as the hypothetical 30% coalition district advanced by plaintiffs and noted by the court in *Ashcroft*, then is there a need to have Section 5 coverage of the jurisdiction? In order to have an "even chance" at winning a 44.3% voting age population district, and we assume equal turnout with 90% minority voter cohesion, a candidate of choice will need to capture 18.1% of the Anglo vote. To have an even chance at winning a 40% minority-turnout district requires 23.3% of the Anglo vote. And, to have an even chance at 30% minority-turnout and 90% cohesion requires 32.8% of the white, Anglo vote. These thresholds for white crossover voting increase as the rate of minority turnout falls.

If candidates are capable of winning in less-than-majority districts (as Sanford Bishop, Cynthia McKinney, David Scott, and, in the past, Andrew Young have done)-- or can exercise control of seats under circumstances where the minority of white voters coalesced with the cohesive minority vote to create winning coalitions -- is Section 5 coverage still necessary? If the prevailing candidate is not just a candidate of choice, but a candidate of color, is Section 5 coverage still necessary? The circumstances that favor the use of coalition districts – sufficient white cross-over vote and political support from minority elected officials – seem to satisfy the notion and circumstances that Section 5 coverage is no longer necessary.

We need to revisit the need to continue Section 5 in all covered jurisdictions

Virginia offers evidence that local circumstances can change in order to allow jurisdictions to "bail out" from under Section 5. Efforts should be made to explore how the Justice Department can further work with jurisdictions that have made real strides in improving their racial political climate, in order to remove the footprint of federal oversight where it is no longer required. The existing rules for bailing out from Section 5 set high evidentiary standards for jurisdictions to attain. Do those standards impede the removal of the preclearance mechanism in states where recent evidence of progress is overwhelming?

A state in which this question is relevant is Georgia. The fastest-growing of the original Section 5 states offers real evidence of voting rights progress in the last decade. African-American candidates run as well or better than white candidates for statewide office of the same party. The work of Professor Epstein indicates that African-American legislative candidates are capable of winning non-majority black districts on an even basis. There are currently two black Republicans in the Georgia Legislature, from heavily-white Gwinnett County and Middle Georgia Houston County. The state has the most-heavily black congressional delegation in the US House (31% of seats). Georgia's African-American Attorney General Thurburt Baker asserted that:

> The State (sic) racial and political experience in recent years is radically different than it was 10 or 20 years ago, and that is exemplified on every level of politics from statewide elections on down. The election history for legislative offices in Georgia - - House, Senate and Congress - - reflect a high level of success by African American candidates [Post-trial brief of the state of Georgia, *Georgia v. Ashcroft* C.A. No. 01-2111 (EGS) (D.C., DC 2002), p. 2].

However, the current rules governing bailing out from under Section 5 preclude Georgia's departure, due to recent objections by the Justice Department. And, many local jurisdictions have a history of Section 5 objections. At the highest levels of government, Georgia accomplished more than any other state covered by Section 5.

Where We Stand in Our Project

My colleague Professor Charles S. Bullock, III, and I are engaged in an extended analysis of the progress in voting rights in Section 5-covered jurisdictions, as such progress pertains to congressional elections. We have completed analyses of three states – Georgia, Louisiana, and South Carolina – and are nearing completion of the analysis in six other states – Alabama, Florida, Mississippi, North Carolina, Texas, Virginia. This research is funded by the American Enterprise Institute.

Our analysis in Georgia reveals a state where substantial progress on voting rights for African-Americans has been made. Black Democratic candidates are little distinguished from white Democratic candidates in elections. African Americans have made significant gains in voter participation, voter turnout, the election of candidates, and recent political science research shows that black candidates and candidates of choice can usually prevail in legislative constituencies as low as 44% African-American. African-American candidates win statewide elections, and the congressional delegation is better than proportional to the black population. John Lewis (GA-5) noted the change in Georgia in his affidavit in *Georgia v. Ashcroft:*

> The state is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great

> distance. I think in - - it's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.[12]

Change is afoot in Georgia, and throughout the South. Circumstance and politics have changed, and both black political empowerment and white acceptance of black politicians is part of that New South. Part of this change is the ability of black politicians to pull, haul, and trade, and the willingness of sufficient white voters to pull the lever for those politicians. Again, as observed by Representative Lewis:

> I think many voters, white and black voters, in metro Atlanta and elsewhere in Georgia, have been able to see black candidates get out and campaign and work hard for all voters. And they have seen people deal with issues as, I said before, that transcend race: economic issues, environmental issues, issues of war and peace. . . So there has been a transformation, it's a different state, it's a different political climate, it's a different political environment. It's altogether a different world that we live, really.[13]

In South Carolina, significant progress has been made in terms of participation and in the election of black candidates to legislative office, and analysis indicates that African-American candidates of choice can prevail in less-than-majority black districts on an even basis. While black candidates enjoy no success statewide, this lack of success is more a function of the fall of the South Carolina Democratic Party than of race of the candidate. Black and white candidates perform similarly poorly with white voters in major contests in the Palmetto State, the notable recent exceptions being Rep. John Spratt and Inez Tenenbaum's bids for Superintendent of Education (but not the US Senate).

Then, in Louisiana, we see evidence of black progress in voter participation through registration and voting. Black legislators are elected to Congress and the state legislature, though not in proportion to their numbers. Louisiana voting is such that black candidates running statewide have failed in their efforts. Racial polarization in insufficient to deny the election of Democrats in general, who are very successful in statewide elections, but African-American candidates fare less well among white voters. However, some black candidates are not candidates of choice of the black electorate, and in Democrat versus Republican head-to-head elections, cohesive black voting plus a minority of the white electorate can elect Democrats who are preferred by black voters. The current domination of statewide offices by Democrats indicates that, at least as previously constituted, the Louisiana electorate afforded circumstances where black voters act as critical partners in crafting statewide majorities for constitutional office.

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[12] Affidavit of John Lewis in *Georgia v. Ashcroft*, 539 U. S. ____ (2003), February 1, 2002, p. 18.
[13] *Ibid*, pp. 15-16.

TABLE 1: THE CHANGING SIZE OF THE BLACK SHARE OF THE ELECTORATE FROM 1960 TO 1984

State	%Black Among Registered Voters 1960	1984	Proportion Gain
South Carolina	11	28	2.54
Mississippi	4	26	6.50
Alabama	7	22	3.14
North Carolina	10	19	1.90
Louisiana	14	25	1.79
Virginia	10	17	1.70
Georgia	15	22	1.47

Source: From Table 6.2 of Earl Black and Merle Black, 1987. *Politics and Society in the South.* Cambridge: Harvard (at page 139).

TABLE 2: VOTER REGISTRATION BY RACE, SEVEN ORIGINAL SECTION 5 STATES VERSUS NON-SOUTHERN STATES

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Alabama													
Black	62.2	57.7	71.4	75.4	68.4	65.3	71.8	66.3	69.2	74.3	72	67.6	72.9
White	73.3	70.2	77.2	74.3	75	74.9	79.3	73.3	75.8	74.1	74.5	73.7	73.8
Georgia													
Black	59.8	51.9	58	55.3	56.8	57	53.9	57.6	64.6	64.1	66.3	61.6	64.2
White	67	59.7	65.7	60.4	63.9	58.1	67.3	55	67.8	62	59.3	62.7	63.5
Louisiana													
Black	69	68.5	74.8	71.9	77.1	72	82.3	65.7	71.9	69.5	73.5	73.5	71.1
White	74.5	67.5	73.2	71.4	75.1	74.1	76.2	72.7	74.5	75.2	77.5	74.2	75.1
Mississippi													
Black	72.2	75.8	85.6	75.9	74.2	71.4	78.5	69.9	67.4	71.3	73.7	67.9	76.1
White	85.2	76.9	81.4	77.3	80.5	70.8	80.2	74.6	75	75.2	72.2	70.7	72.3
North Carolina													
Black	49.2	43.6	59.5	57.1	58.2	60.1	64	53.1	65.5	57.4	62.9	58.2	70.4
White	63.7	62.5	67	65.8	65.6	63.6	70.8	63.9	70.4	65.6	67.9	63.1	69.4
South Carolina													
Black	61.4	53.3	62.2	58.8	56.7	61.9	62	59	64.3	68	68.6	68.3	71.1
White	57.2	54.5	57.3	56.4	61.8	56.2	69.2	62.6	69.7	67.9	68.2	66.2	74.4
Virginia													
Black	49.7	53.6	62.1	66.5	63.8	58.1	64.5	51.1	64	53.6	58	47.5	57.4
White	65.4	60.8	63.7	63.3	68.5	61.9	67.2	63.6	68.4	63.5	67.6	64.1	68.2
Non-South													
Black	60.6	61.7	67.2	63.1	65.9	58.4	63	58.3	62	58.5	61.7	57	na
White	69.3	66.7	70.5	66.2	68.5	64.4	70.9	65.6	68.1	63.9	65.9	63	na

Source: Various post-election reports by the U.S. Bureau of the Census.

TABLE 3: VOTER TURNOUT BY RACE, SEVEN ORIGINAL SECTION 5 STATES VERSUS NON-SOUTHERN STATES

	1980	1982	1984	1986	1988	1990	1992	1994	1996	1998	2000	2002	2004
Alabama													
Black	48.9	41.5	54.8	55.2	52.4	45.7	58.1	53.5	54.3	51.6	57.2	43.3	63.9
White	59.2	52	62.8	52.5	58.4	52.7	65.9	64.3	56.3	51.6	60.8	50.7	62.2
Georgia													
Black	43.7	32.5	45.9	37.3	42.4	42.3	47.1	30.9	45.6	40.2	51.6	38.5	54.4
White	56	40.7	55.3	40.5	53.2	42.6	58.7	38.3	52.3	36.8	48.3	44.8	53.6
Louisiana													
Black	60.1	32	66.4	55.8	61.5	55.9	71.5	30.9	60.9	46	63.2	46.9	62.1
White	65.6	23.6	64.7	57.5	67.5	50.2	68.3	35.6	62.6	35.7	66.4	51	64
Mississippi													
Black	59.5	50.8	69.6	40.2	60.3	32.5	61.9	41.7	48.8	40.4	58.5	40.2	66.8
White	70.9	52.4	69.2	45.8	64.2	35.8	69.4	46.2	59.3	40.7	61.2	43.6	58.9
North Carolina													
Black	38.8	30.4	47.2	39.1	46.6	48.1	54.1	28.3	48.7	38.2	47.6	42.2	63.1
White	55.9	41.7	59.1	47.1	55.2	49.9	62.4	38.4	56.4	40.5	55.9	43.5	58.1
South Carolina													
Black	51.3	38.9	51.4	42	40.7	44.6	48.8	38.7	49.9	42.8	60.7	48.7	59.5
White	51.7	37	47.9	41.3	52.3	42	61.6	49.4	56.2	48.8	58.7	45.1	63.4
Virginia													
Black	42.9	44.3	55	42.5	47.7	32	59	33.8	53.3	23.8	52.7	27.2	49.6
White	58.3	46.2	57.8	36.8	61.1	39.6	63.4	50.4	58.5	32.4	60.4	37.8	63
NonSouth													
Black	52.8	48.5	58.9	44.2	55.6	38.4	53.8	40.2	51.4	40.4	53.1	39.3	na
White	62.4	53.1	63	48.7	60.4	48.2	64.9	49.3	57.4	45.4	57.5	44.7	na

Source: Various post-election reports by the U.S. Bureau of the Census.

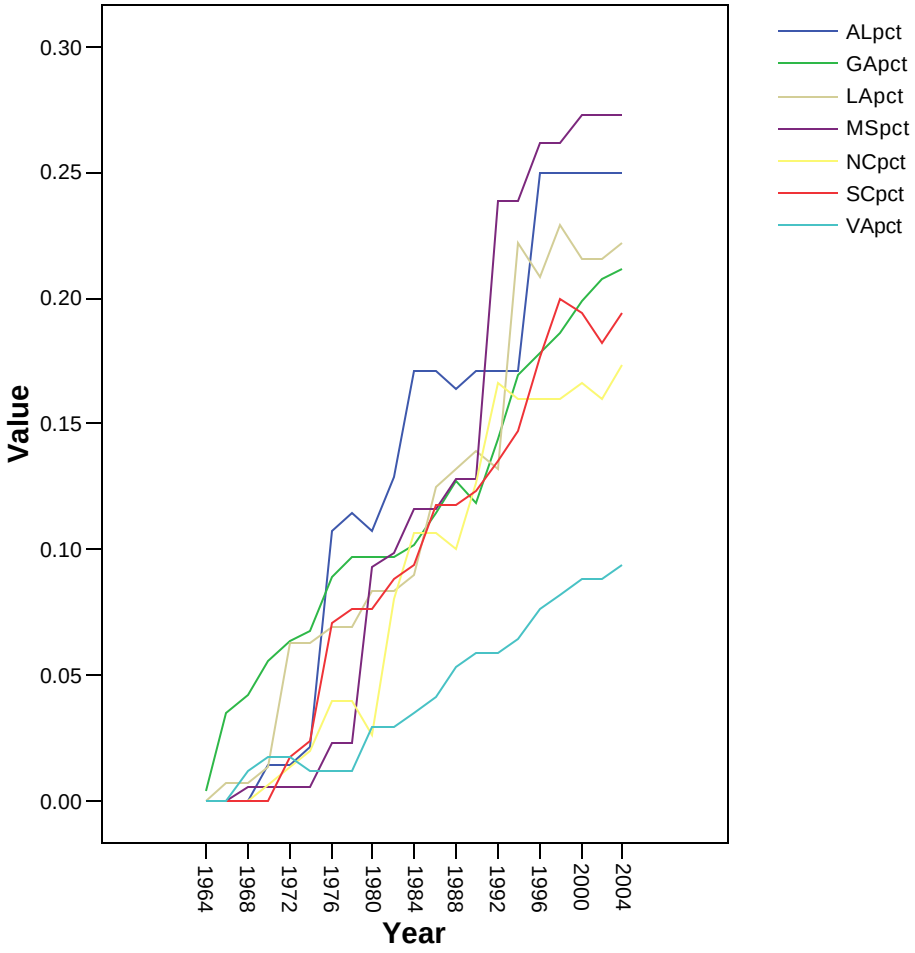

FIGURE 1: PROPORTION OF STATE LEGISLATORS WHO ARE AFRICAN-AMERICAN, SEVEN STATES COVERED BY SECTION 5

TABLE 4: DATA ON BLACK LEGISLATIVE OFFICE HOLDING FROM FIGURE 1

Year	Alabama	Georgia	Louisiana	Mississippi	North Carolina	South Carolina	Virginia
1964	0	1	0	0	0	0	0
1966	0	9	1	0	0	0	0
1968	0	11	1	1	0	0	2
1970	2	14	2	1	1		3
1972	2	15	9	1	2	3	3
1974	3	16	9	1	3	4	2
1976	15	21	10	4	6	12	2
1978	16	23	10	4	6	13	2
1980	15	23	12	16	4	13	5
1982	18	23	12	17	12	15	5
1984	24	24	13	20	16	16	6
1986	24	27	18	20	16	20	7
1988	23	30	19	22	15	20	9
1990	24	28	20	22	19	21	10
1992	24	34	19	41	25	23	10
1994	24	40	32	41	24	25	11
1996	35	42	30	45	24	30	13
1998	35	44	33	45	24	34	14
2000	35	47	31	47	25	33	15
2002	35	49	31	47	24	31	15
2004	35.	50	32	47	26	33	16
N	140	236 (GA: N=259 until 1971, 251 in 1971, 236 since 1973)	144	172	150	170	140

Source: Charles S. Bullock III and Mark J. Rozell, Forthcoming. *The New Politics of the Old South.* Boulder: Rowman and Littlefield.

TABLE 5

AFRICAN-AMERICAN REPRESENTATIVES AND AFRICAN-AMERICAN CITIZEN VOTING AGE POPULATION, ORIGINAL SECTION 5 STATES AND OTHER STATES

State	Citizen VAP	Black CVAP	African-American Proportion: CitizenVAP	Representatives
United States	193,376,975	22,614,559	.12	.092
Alabama	3,276,570	791,752	.24	.143
Georgia	5,675,210	1,564,032	.28	.308
Louisiana	3,198,079	957,771	.30	.143
Mississippi	2,049,386	684,233	.33	.250
North Carolina	5,820,423	1,199,611	.21	.154
South Carolina	2,939,606	811,761	.28	.167
Virginia	5,051,517	955,503	.19	.091
Seven Original Covered Southern States	28,010,791	6,964,663	.25	.18
Florida	11,081,542	1,365,175	.12	.12
Texas	13,299,845	1,606,131	.12	.094
US, Outside Seven Original Covered Southern States	165,366,184	15,649,896	.095	.078
US, Outside Nine Covered Southern States	140,984,797	12,678,590	.089	.073

Source: Data compiled by author from the U.S. Census and Michael Barone and Richard E. Cohen (2005). *The Almanac of American Politics 2006.* Washington, DC: National Journal.